

EXHIBIT

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Hon. William McCurine, Ret.
Judicate West
402 West Broadway, Suite 2400
San Diego, CA 92101
Telephone (619) 814-1966

JUDICATE WEST— SAN DIEGO

PETER WHEELER and CHRISTOPHER
COOPER

Claimants,

v.

WFA OF SAN DIEGO, LLC.; ZERMATT
HOLDINGS, LLC; and DOES 1 through
20,

Respondents.

CASE NO.: A310089

RULING ON RESPONDENTS' MOTION TO
DISMISS CLAIMANTS' CLAIM IN
ARBITRATION

Respondents have brought a motion to dismiss Claimants' most recent demand for arbitration.

LEGAL STANDARDS

A. Demurrer

Respondents have demurred to Claimants' Statement of Claim ("SOC") in the current arbitration. "Neither trial nor appellate courts should be distracted from the main issue, or rather, the only issue involved in a demurrer hearing, namely, whether the complaint, as it stands, unconnected with extraneous matters, states a cause of action" *Citizens for Parental Rights v. San Mateo County Bd. of Education*, (1975) Cal.App.3d 1, 36 (citing *Griffith v. Department of Public*

1 *Works* (1956) 141 Cal.App.2d 376, 381.). “In ruling upon a general demurrer (or a motion to
 2 dismiss) the allegations of the complaint must be regarded as true. It is assumed that plaintiffs can
 3 prove all facts as alleged; defects in the complaint which do not affect the substantial rights of the
 4 parties are disregarded.” *Id.* It “is well settled that a general demurrer admits the truth of all
 5 material factual allegations in the complaint...; that the question of plaintiff’s ability to prove
 6 these allegations, or the possible difficulty in making such proof does not concern the reviewing
 7 court ...and that plaintiff need only plead facts showing that he may be entitled to some relief .”
 8 *Alcorn v. Anbro Engineering, Inc.*, (1970) 2 Cal.3d 493, 496. The parties all acknowledge that a
 9 demurrer at this stage in an arbitration is rare.

11 *B. Statement Of Claim in Arbitration*

12 The part agreed to arbitrate their dispute under Judicate West Commercial Arbitration Rules.
 13 Rule 5.3.1 reads as follows:
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15 When one party unilaterally commences arbitration (“Claimant”), that party shall
 16 serve a written Notice of Intent to Arbitrate (“NIA”) on the other party(ies)
 17 (“Respondent(s)”) with the following information:

- 18 1. The full names and addresses of all parties and, to the extent
 19 known, their attorneys;
- 20 2. A statement describing the general nature of the claim or dispute,
 21 including its factual basis, and a list of the full names, addresses, and brief
 22 descriptions of all known potential witnesses;
- 23 3. A demand that the dispute be arbitrated;
- 24 4. An attached copy of the arbitration agreement;
- 25 5. The relief or remedy(ies) sought; and
- 26 6. Proof of service/receipt of the NIA.

DISCUSSION

A. The Adequacy of the SOC

Zermatt has challenged the adequacy of the SOC. However, there is no significant difference in the adequacy or thoroughness of the facts pleaded in the SOC and the Ohio complaint. Both pleadings adequately inform the opposing party of the charges and the remedies being sought. The SOC satisfies Judicate West Commercial Arbitration Rules. Rule 5.3.1.

B. The Two Settlement Agreements

Two settlement agreements are at the heart of the current dispute. Peter Wheeler, his company and Zermatt entered into the two settlement agreements: the October 2022 settlement agreement (“the First Agreement”) and the March 2023 settlement agreement (“the Second Agreement”). They share a certain key provision which bear on the motion to dismiss.

Judge Link has already determined (and the parties concede) that Cooper is a third party beneficiary to the two settlement agreements. Respondent acknowledges that a third-party beneficiary like Cooper “can enforce a contract’s dispute resolution provision as to claims “arising under the contract,” he cannot do so as to “other claims” which do not arise under the contract.”¹ Respondents correctly cite *Fuentes v. TMCSF, Inc.* (2018) 26 Cal.App.5th 541, 551. It is equally true that a “third party beneficiary may enforce a contract expressly made for his benefit. (Civ. Code, § 1559) And although the contract may not have been made to benefit him alone, he may enforce those promises directly made for him.” *Murphy v. Allstate Insurance Co* (1976) 17 Cal.3d 937, 943.

C. The Handling of Future Disputes

¹ Respondent’s Motion To Dismiss, Pg. 8, ll.15-25

1 The recitals of the First Agreement specifically cover the Asset Purchase Agreement
 2 “(APA”), Peter Wheeler and his companies, and the employment contract that Peter Wheeler
 3 entered with Zermatt. Both agreements contain nondisclosure non-competition covenants for the
 4 benefit of the Zermatt entities. The recitals in the Second Agreement are very similar but also
 5 encompass disputes between the parties that arose after the First Agreement. Paragraph 12 of the
 6 First Agreement is identical to paragraph 8 of the Second Agreement with one exception. The
 7 Second Agreement specifically includes the First Agreement.

9 The First Agreement and Second Agreement contain the following provision: “*In the event of*
 10 *any dispute* between them, including related to a breach of this Agreement, or the October 2022
 11 Settlement, the Parties agree that they will submit such dispute to the exclusive jurisdiction of
 12 Judge Frederick Link (Ret.) for resolution, with venue in San Diego, California, without prejudice
 13 to the right to seek preliminary injunctive relief.” ¶¶12 and 8, respectively. The Second
 14 Agreement also covers any breach of the First Agreement. Further, the Second Agreement
 15 provides: “Except where explicitly stated in this Agreement, the terms and conditions of the
 16 October 2022 Settlement remains in full force and effect and is not intended to be superseded by
 17 this Agreement.” ¶6.

19 The phrase “*any dispute* between them” is very broad and evidences the parties’ strong desire
 20 to be bound by the arbitration provisions of the two agreements. Given the parties’ mutual distrust
 21 and litigious history *inter se*, such a provision is reasonable and appropriate. The repeated phrase
 22 “arising under or related to” is intentionally broad and the courts construe the terms to be broad.
 23 The two subject settlement agreements look backward in time but they also look forward in time.
 24 Indeed, the term “enforcement” envisions *future conduct*, (*that is post March, 2023 conduct*) that
 25 might be subject to injunctive relief. So, if there is a breach of either agreement or rights
 26 thereunder that must be specifically enforced, they must be prosecuted in an arbitration or court in
 27
 28

1 San Diego. Further, the First Agreement specifically reaches future conduct: “Although this
2 Agreement provides a full release as to past behavior, as defined above, the Parties expressly do
3 not intend to waive any claims based on any future behavior of the Parties.” ¶10. The parties have
4 agreed to arbitrate “related to” the two settlement agreements and “arising from” therefrom,
5 indicating a strong desire to broadly cover disputes between them. *See Cape Flattery Ltd. v. Titan*
6 *Mar., LLC*, 647 F.3d 914,922 (9th Cir. 2011)
7

8 On November 3, 2023, Judge Link ruled that “[t]he Agreement does not release any
9 claims against any releasee relating to any acts or conduct engaged in by a releasee after the
10 agreement was entered into on March 21, 2023, so long as this conduct or purported injury does
11 not arise out of, or is not in any way connected to, the disputes settled in the Agreement.” This
12 language further comports with the broad language in the two agreements involving jurisdiction
13 over future disputes between the parties.
14

15 The parties’ use of the broad language in the two agreements covers the matters raised in the
16 Ohio lawsuit. The provisions in question in the two settlement agreements were made to benefit
17 Wheeler, Zermatt, and third party beneficiary Cooper.

18 Wheeler and Cooper can rightfully compel Zermatt to arbitrate in San Diego the matters that
19 arise under the two settlement agreements. Therefore, Wheeler and Cooper can compel arbitration
20 of the matters alleged in the Ohio lawsuit.
21

22 *D. First, Second, Fourth and Fifth Causes of Action*

23 The first, second, fourth and fifth causes of action shall proceed by way of arbitration in
24 San Diego.

25 *E. Third Cause of Action (Malicious Prosecution)*

26 The third cause of action is dismissed without prejudice as premature.
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3 CONCLUSION

4 Nothing in this ruling should be regarded as ruling on the merits of the various causes
5 of action.
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7 Date:

8 William McCurine, Jr.
9 Hon. William McCurine, Ret.
10 Arbitrator
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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN DIEGO:

I am employed in the County of San Diego, State of California. I am over the age of 18 and am not a party to the within action. My business address is 402 West Broadway, Suite 2400, San Diego, CA 92101.

On June 5, 2024 I served the following document(s), described as:

RULLING ON RESPONDENTS' MOTION TO DISMISS CLAIMANTS' CLAIM IN ARBITRATION

SEE ATTACHED MAILING LIST

- (X) BY E-MAIL I caused the above-referenced document to be transmitted via electronic mail (e-mail) to the parties as listed on this Proof of Service
- () BY ELECTRONIC FILING I caused such document to be sent via electronic service by submitting an electronic version of the document(s) to One Legal, LLC, through the user interface at www.onelegal.com.
- () BY FACSIMILE I caused the above-referenced document to be transmitted via facsimile to the parties as listed on this Proof of Service. The document was transmitted by facsimile transmission and the transmission was reported as complete and without error.
- () BY PERSONAL SERVICE I personally delivered the documents to the persons at the address (es): by leaving the documents at the person (s) office, in an envelope or package clearly labeled to identify the person(s) being served, with a receptionist or an individual in charge of the office.
- () BY UNITED STATES PARCEL SERVICE I am readily familiar with the business' practice for collection and processing of correspondence and mailing with the United States Postal Service; such correspondence would be deposited with the United States Postal Service the same day of deposit with postage thereon fully prepaid at Santa Ana, California in the ordinary course of business
- (X) STATE I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
- () FEDERAL I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on June 5, 2024 at San Diego, California.


MaryAnn Campbell
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as of Wednesday, June 5, 2024

JW Case #: A310089

Case Caption: Peter R. Wheeler, et al. vs. WFA of San Diego, LLC, et al.

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